In this case there is no record of any application for grounds of decision, and perhaps none was necessary, for the Settlement Officer concluded a very searching and thorough inquiry by recording what he described as his finding, consequent upon which he made his order. This order by section 85(5) of the Enactment should be in the form of Schedule XII, but this was not exactly followed; however there is no ambiguity and the departure from the approved form does not appear to be fatal.

Thus the appeal period expired thirty days later, that is to say on the 17th of February, 1949. By Exhibit "A" there is evidence that the applicant first gave notice of appeal on the 10th of February, 1949, which was within time, but the necessary fees were not paid and therefore the appeal was not filed and remains unfiled.

On the 22nd of February, 1949, the applicant was informed that the appeal period had expired and that she should seek extension of time if she wished to pursue it.

Requirements of translation caused delay until a few days after the 4th of April, 1949, the exact date is not given.

Then on the 14th of April, 1949, the applicant consulted counsel, but no Advocate fees were forthcoming. In her affidavit the applicant attributed further delay to ignorance of procedure and misunderstanding of the payment of fees, but the truth is that the subsequent delay was on account of non-satisfaction of Advocate's fees. At all events the proceedings were not in Counsel's hands until 15th of August, 1949, and application for translation was not made until the 24th of August, 1949.

Now does this history amount to special circumstances such as to render extension of time just (section 186(5) of the Enactment)? The latest possible date following section 186 of the Enactment, within which appeal lay was the 19th of March, 1949, that is to say, had procedure been to obtain grounds of decision; as I have observed the grounds in this case were described as a finding and given on the 18th of January, 1949, together with the order, so here the appeal period expired on the 17th of February, 1949. The applicant's motion was filed on the 6th of September, 1949, or approaching seven months after the expiration of the appeal period.

I have had reference to the reported case of *Jacobson v. Lee*[1]. In the judgment of Harman J. is stated:—

> It was important that litigants should not be shut out from their rights, but it was equally important that a litigant who had a judgment in his favour should not have it taken away from him except in very special circumstances. It was in the interest of the public that there should be an end of litigation. In Dunn v. Beausire (unreported, see note in Annual Practice (1948) page 1249) the Court of Appeal held that mere mistake and hardship were insufficient to justify an application. The question was whether there was here anything more than mere mistake and hardship.

I have also been guided by the case of *Manickam v. Tremelbye (Selangor) Rubber Co., Ltd.*[2], in which special circumstances sufficient to render an extension just were considered, and I was much impressed by the citation therein from *Re Helsby*[3]:—

> Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him,' or in case of 'inevitable accident'.

I think it must be emphasised that there must be finality to litigation. The Court has discretion and the question is whether on the facts of this particular case it should be exercised. In the Annual Practice 1948 at page 1347/8 many cases and examples are cited, and the principle appears to be that discretion may be exercised if some equity can be shewn arising from accident or mistake.

Up till the 14th of April, 1949, there might be much to assist the applicant, but from that date onwards for several months she was responsible for the non-furtherance of the application because of omission to fully instruct Counsel.

I cannot hold that such delay constitutes special circumstances. I do not think a party can successfully urge extension of time within which to appeal on the grounds of failure to fully instruct Counsel. The other side on the expiration of the appeal period naturally concludes finality, and it does not seem just to revive the matter on appeal because it took from April to August for the applicant to brief Counsel.

The application to appeal out of time is dismissed with costs in favour of the respondent.

Application Dismissed.

MANASSEH v. THE ATTORNEY-GENERAL AND MUSTAPHA BIN AHMAD .... THIRD PARTY.

[Orig. Civ. Juris. (Jobling, J.) September 17, 1949]

[Penang — Crown Suit No. 1 of 1949]

Rules of the Supreme Court, 0.30 r.11 — Discovery of documents against Crown — Crown Suits Ordinance, Ss. 23, 56, 58(a).

On a Summons for directions in this matter the plaintiff applied for an Order under 0.30 r.11 of the Rules of the Supreme Court, 1934, for discovery of documents against the defendant. The defendant in objecting submitted that the application could not be granted as it was for an Order for discovery against the Crown and it had already been decided by the Court of Appeal, Singapore in **Khoo Sian Tean** v. **Attorney-General**[1] that such an Order could not be made.

Held, that there is no ground for making an exception of the rule regarding discovery of documents and that 0.30 r.11 of the Rules of the Supreme Court applies to the Crown. **Khoo Sian Tean** v. **Attorney-General**[1] not followed.

Cases referred to :—

(1) *Khoo Sian Tean v. Attorney-General*, (Crown Suit No. 8 of 1907 — unreported).

(2) *Thomas v. The Queen* (1874) 10 Q.B.L.R. 44.

(3) *La Societe des Affreteurs Reunis v. The Shipping Controller* (1921) 3 K.B. 1.

(4) *Jamieson v. Downie* (1923) A.C. 691.

(5) *Metropolitan District Railway v. Sharpe* 50 L.J.Q.B. 21.

SUMMONS FOR DIRECTIONS.

T. E. Conaghan for the Plaintiff.

C. Wylie (Federal Counsel) for the Defendant.

F. G. Pooley for the Third Party.

Cur. Adv. Vult.

Jobling, J. : — On a Summons for directions in this matter the Plaintiff applied for an Order under Order 30 rule 11 of the Rules of the Supreme Court for discovery of documents against the Defendant and on the Defendant objecting the matter was adjourned to Open Court for argument.

Mr. Wylie for the Defendant submitted that the application could not be granted as it was for an order for discovery against the Crown and it had already been decided by the Court of Appeal, Singapore in *Khoo Sian Tean v. Attorney-General*[1] that such an order could not be made. The decisions in *Thomas v. The Queen*[2] and *La Societe des Affreteurs Reunis*[3] were referred to in support of this submission.

Mr. T. E. Conaghan for the Plaintiff and Mr. Pooley for the Third Party submitted that the judgment of the Judicial Committee of the Privy Council in *Jamieson v. Downie*[4] overruled the Singapore decision and was ample authority for their contention that the general words of Sections 23 and 56 of the Crown Suits Ordinance (Cap. 43) gave a right of discovery against the Crown by necessary implication.

In considering the cases referred to in order to arrive at the principles which govern the point in issue I can get no assistance from *Khoo Sian Tean v. Attorney-General* as the judgment has not been reported and the record cannot now be traced in Singapore.

This case is however given as authority for the following note in *Mallal's* S.S. Practice at page 178, namely :—

> Notwithstanding the general words of Sections 23 and 56 of the Crown Suits Ordinance (Cap. 43) the plaintiff in a petition of right cannot obtain discovery of documents against the Crown.

The Sections referred to in this note read as follows :—

> 23. All the subsequent proceedings in the matter of such petition down to and including the trial shall be conducted in the same manner, and subject to the same rules of practice and procedure as are in force in respect of suits for a similar purpose between subject and subject.
>
> 56. Subject to the several provisions of this Ordinance the law of practice and procedure in force in the High Court for the time being in proceedings between subject and subject shall be applicable to all proceedings of a similar kind under this Ordinance.

I accept the report as far as it goes but in the absence of the judgment I can only regard the decision as a bare refusal to make the order and look for the principles governing the matter elsewhere.

In England until the passing of the Crown Proceedings Act, 1947 which specifically authorised such orders no order for discovery could be made against the Crown. This was decided in *Thomas v. The Queen*[2] *supra* in 1874 and referred to with approval in 1921 in *La Societe des Affreteurs Reunis v. The Shipping Controller*[3] *supra* and despite the Privy Council decision in 1923 in the New South Wales case of *Jamieson v. Downie*[4] *supra* its authority never appears to have been questioned.

In *Thomas v. The Queen*[2] the Court had before it Section 7 of the Petitions of Right Act, 1860 and referred to Section 50 of the Common Law Procedure Act, 1854 which are set out hereunder :—

> Section 7. So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the laws and statutes in force as to pleading, evidence, hearing, and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is presented shall otherwise order, be applicable and apply and extend to such petition of right: Provided always, that nothing in this Act shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

The relevant part of Section 50 reads as follows :—

> Upon the application of either party.....
> .....it shall be lawful for the court or judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession.....

After considering these two Sections the Court refused to make an order, Cockburn, C.J., remarking :—

> If it had been intended to extend Section 50 of the Common Law Procedure Act, 1854, as to discovery of documents, to the case of Petitions of Right, there would have been inserted some enactment saying that an officer should answer as in the case of bodies corporate.

This applies the well-established principle that express terms are required to apply any law to the Crown and in applying this principle the Court appears to have given weight to the fact that no provision had been made for any particular officer of the Crown to answer as in the case of bodies corporate.

Thomas v. The Queen[2] was referred to with approval in *La Societe des Affreteurs Reunis v. The Shipping Controller*[3] in 1921. The right to discovery then no longer depended on Section 50 of the Common Law Procedure Act, 1854 but on the Judicature Acts and the rules made thereunder but the provisions were substantially the same and contained specific reference to bodies corporate.

Prior to 1947 the differences in the law in England and Malaya on this matter appear to have been two. First, in England the proceedings were against the Crown and there was no officer appointed to answer an order but in Malaya they were against the Attorney-General and therefore the order could be directed to a particular officer to answer. And secondly, in England the laws and statutes in force as to practice and procedure were applied "so far as the same may be applicable" but in Malaya they were applied without any qualification.

Both these differences tend to weaken the authority of *Thomas v. The Queen*[2] in Malaya but nevertheless the Court of Appeal, Singapore appears to have followed the decision in that case in *Khoo Sian Tean v. Attorney-General* in 1907.

We now come to the New South Wales case of *Jamieson v. Downie*[4] which came before the Judicial Committee of the Privy Council in 1923 and decided that an order for discovery against the Crown could properly be made in New South Wales.

The decision in this case turned on Sections 3 (i) and 4 of the Claims against the Government and Crown Suits Act, 1912 (New South Wales) which read as follows :—

> 3(i). Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal defendant in the matter of such petition and the Government may by notification in the Gazette appoint any person resident in New South Wales to be a nominal defendant accordingly.
>
> 4. The petitioner may sue such nominal defendant at law or in equity in any competent Court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject.

Lord Buckmaster in delivering judgment only referred to *Thomas v. The Queen*[2] as follows :—

> The decision in the English Courts in **Tobin vs. The Queen** (14 C.B. (N.S.) 505) shows that the words 'so far as the same may be applicable' do not take away the rights of the Crown with regard to pleading, and the case **Thomas** v. **The Queen** shows that they do not affect the right to resist discovery.

and after quoting Sections 3 and 4 of the New South Wales Act went on :—

> The argument for the Crown is that as at the passing of this statute there were undoubtedly existing privileges in the Crown with regard to discovery, these rights could not be taken away except by express statutory provision or the operation of clear and necessary implication. That proposition might be accepted, but it is subject to this, that the implication may arise from the use of general words which, properly construed, will exclude the right, and this is illustrated by a decision arising under a similar statute containing provisions comparable to those under s. 3, sub-s. 1. One of the rights of the Crown is not to be liable in any action of tort at the instance of a subject. That right is not, by express provision, taken away by the statute except so far as that express provision can be gathered from general words. It has, however, been held by this Board in **Farnell v. Bowman** (12 A.C. 643) that the phrase 'any just claim or demand whatever' include a claim in tort as well as a claim under contract, and it consequently follows that the Act does materially affect the existing rights of the Crown.

His Lordship then discussed the effect of the words "as nearly as possible" in Section 4 (which do not occur in our Law) and continued :—

> Their Lordships can see nothing in the phrase mentioned to destroy the general effect of the preceding words, which are wide enough to create the right claimed in this action, and for the same reasoning that supports the judgment in **Farnell v. Bowman** (12 A.C. 643) their Lordships think it is not right to limit the wide operation of the general words of the section. The Act was intended materially to change the existing rights of the Crown, and just as it has brought within its ambit sections that were hitherto not permitted, their Lordships think it has included procedure heretofore inapplicable.

It is clear that this judgment was solely directed to deciding the law as it stood in New South Wales and it did not affect the authority of *Thomas v. The Queen*[2].

The point I have to consider is whether the judgment affects the Singapore Court of Appeal decision in *Khoo Sian Tean v. Attorney-General supra.*

I think it does. I do not know on what principles that case was decided but if I apply to it the principle applied in *Jamieson v. Downie*[4] I come to a different conclusion to that come to by the Singapore Court of Appeal.

I conclude therefore that the Judicial Committee of the Privy Council has laid down a different principle to that on which *Khoo Sian Tean v. Attorney-General*[1] was decided, that the latter decision has, therefore, in effect been overruled and that I must apply the principle which has the approval of the Privy Council namely; that the rights of the Crown cannot be taken away except by express statutory provision or the operation of clear and necessary implication but that the implication may arise from the use of general words.

The words of Section 23 of the Crown Suits Ordinance are an unqualified application of all the rules of practice and procedure which are in force in respect of suits between subject and subject. The words are general but their meaning is precise. They refer to specific rules and declare that these shall apply to "all subsequent proceedings" i.e. subsequent to the Crown filing an answer to the petition. They do not expressly mention the Crown but in an Ordinance enacted to provide for the conduct of suits by and against the Crown they seem by clear and necessary implication to apply to the Crown.

To single out the rule as to discovery and hold that it does not apply to the Crown would be tantamount to holding that all the rules of practice and procedure in force in this Court do not so apply. This would in my opinion be contrary to the plain intention of the Section and render it practically meaningless.

If the rule as to discovery is to be treated differently to the other rules of practice and procedure the Crown must show that it has some special rights in the matter of discovery. No special right has been claimed and I am not aware of any that could be.

The Crown privilege to refuse disclosure of certain documents in the public interest was referred to in argument but this of course has nothing whatever to do with the matter before the Court. Privilege can be claimed to the full at a later stage when complying with the order and should ensure that discovery is made of only those documents which the Crown considers it can properly disclose without danger to public interests.

In my view there is no ground for making an exception of the rule regarding discovery of documents, and following the principle laid down in *Jamieson v. Downie*[4] I hold that it applies to the Crown.

One other matter remains for consideration.

Section 58(a) of the Crown Suits Ordinance reads as follows :—

> "58. Nothing herein contained shall be held —
> (a) to abridge, or lessen, or otherwise affect the rights of the Crown in any matter or manner otherwise than and except as is expressly enacted herein."

This is a re-statement of the well-established principle referred to in *Jamieson v. Downie*[4] but the words "or by the operation of clear and necessary implication" are missing and this raises the question whether section 58(a) properly construed means that Crown rights can only be affected by legislation containing express words referring to the Crown and to the rights that are to be affected.

I think the difficulty is more apparent than real and the answer is to be found in the case of the *Metropolitan District Railway v. Sharpe*[5]. In giving judgment in that case in the House of Lords, Lord Blackburn considered the phrase "except as expressly varied by this Act" and said :—

> I do not think that because the words used in this Act are 'expressly varied' it is essentially necessary that there should be express words saying: 'This particular section or provision shall not apply'. I do not think express words are required for that purpose but it does require something that indicates an express intention that they shall not apply.

To expressly enact therefore is to enact with an express intention.

The only express intention I can assign to Section 23 of the Crown Suits Ordinance is that the Rules of Practice and Procedure shall apply to all proceedings by both parties to Crown Suits. This intention cannot be given effect to without abridging the Crown rights and I think therefore that it shows an express intention of affecting those rights.

Taking the Ordinance as a whole it is clear that no express mention of the Crown rights is necessary to abridge them. Other Sections than Section 23, for instance, Section 22, undoubtedly cast several obligations on the Crown which affect its rights but do not make any direct mention of those rights.

In my opinion the Crown right to resist discovery has been expressly taken away by Section 23 and it is not therefore saved by Section 58(a).

For the reasons given above I grant the application and order discovery by both parties in accordance with Order 30 rule 11 of the Rules of this Court.

Application Granted.

MANASSEH v. THE ATTORNEY-GENERAL AND MUSTAPHA BIN AHMAD .... THIRD PARTY.

[Orig. Civ. Juris. (Jobling, J.) October 20, 1949]

[Penang — Crown Suit No. 1 of 1949]

Negligence — General and special damages against a servant of the Crown — Quantum of damages.

In this case the plaintiff's claim was for general and special damages in respect of injuries alleged to have been caused by the negligence of a servant of the Crown. The defendant denied the allegation and claimed that the injuries were caused by the negligent act of the third party.

The plaintiff's (a student) case was that on 16th April, 1948 at about 11 a.m. he was proceeding on his bicycle at about 5 or 6 m.p.h. along Kelawei Road towards Bagan Jermal on his proper side and close to the curb when he was knocked down by a Police Constable on a motor cycle who came at considerable speed from the opposite direction. He lost consciousness and did not regain it until he was in hospital. His principal injuries were a broken wrist and a broken leg. He remained in hospital until 22nd May, 1948 and after discharge visited it periodically for treatment until 13th November, 1948.

Held, on the evidence that the cause of the injury to the plaintiff was **firstly**, the negligent act of Police Constable 7789 in rounding a bend in the road at a speed which deprived him of proper control of his vehicle and **secondly**, the negligent act of the Third Party in driving his motor car partly on the wrong side of the road at a bend therein.

CROWN SUIT.

T. E. Conaghan for the Plaintiff.

C. Wylie (Federal Counsel) for the Defendant.

F. G. Pooley for the Third Party.

Jobling, J. : — After giving the facts as stated in the Head Notes and reviewing the evidence his Lordship concluded: "I find therefore that the cause of the injury to the Plaintiff was *first*, the negligent act of P.C. 7789 in rounding a bend in the road at a speed which deprived him of proper control of his vehicle and *secondly*, the negligent act of the Third Party in driving his motor car partly on the wrong side of the road at a bend therein. I find that it was the coincidence of these two negligent acts that resulted in injury to the Plaintiff and that both the Defendant and the Third Party are equally responsible for it.

"The special damages incurred have been agreed at $1,312.00 and there is only the question of general damages to be decided.

"The Plaintiff suffered a fracture of the right leg and wrist and it was not until 1st October, 1948, a period of 5½ months, that he was able to resume his studies at school. He has suffered considerable pain and discomfort over a long period and that pain has not yet entirely disappeared. The medical evidence shows that Plaintiff has completely recovered except for occasional pain and a slight limitation of the dorsiflection of the right foot and that the former will disappear but the latter will probably be permanent.

"The grounds for general damages are, therefore, the pain and discomfort suffered, the loss of 5½ months schooling and the slight permanent disability. After consideration of these matters and taking into account Plaintiff's youth and circumstances I award $1,250.00 as general damages.

"Judgment will, therefore, be entered for the Plaintiff for $1,312.00 special damages and $1,250.00 general damages and costs against the Defendant and for the Defendant against the Third Party of half those general and special damages and half those costs with half such costs as are attributable to the Third Party proceedings."

Judgment Accordingly.

PUBLIC PROSECUTOR v. SOH TUAN CHEUNG & 2 ORS.

[App. Cr. Juris. (Taylor, J.) September 30, 1949]

[K.L. — Cr. App. from Sessions Court No. 32 of 1949]

Customs Enactment, 1936 — Joint possession of a quantity of uncustomed goods.

In this case the three accused were charged with knowingly being in possession of a commercial quantity of uncustomed cigarettes which were found in a lorry driven by the second accused, the other two being also in the lorry. Evidence of a statement made by one of them to a Customs Officer was tendered by the prosecution but rejected by the learned President of the Sessions Court. At the close of the case for the prosecution all three accused were acquitted on the ground that they were not proved to have been in possession.

The Public Prosecutor appealed on the grounds:— (a) that the evidence mentioned was wrongly rejected; (b) that there was evidence of possession which, if unrebutted, would have warranted a conviction.

Held, that it is no doubt correct that when the evidence points to only one of the several accused being guilty and the circumstances do not implicate one rather than another the Court will be left in doubt and therefore should acquit them all (even though convinced that one or other of them must be guilty), but when, the evidence points to a joint enterprise the Court ought to consider whether a **prima facie** case of joint possession is made out and if so should call on the accused for their defence. It is still open to the accused to shew that the possession was not joint.

CRIMINAL APPEAL.

H. Shepherd (D. P. P.) for the Appellant.

R. H. V. Rintoul for the First Respondent.

Second and Third Respondents in person.

Cur. Adv. Vult.